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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS LINDROTH THOMAS,

Defendant and Appellant.

G040023

(Super. Ct. No. 05HF0123)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Francisco P. Briseno, Judge. Affirmed as modified.

Marcia R. Clark, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant
Attorney General, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General,
for Plaintiff and Respondent.

Appellant Dennis Thomas was convicted of first degree murder for fatally shooting his stepfather. Following the verdict, he moved for a new trial on the ground his attorney was ineffective for failing to adequately pursue a defense of others theory. After hearing extensive evidence on the issue, the trial court denied the motion. It concluded that, in light of the facts surrounding the shooting and Thomas' trial testimony, the defense of others was not a viable theory, and thus counsel was not ineffective for failing to pursue it more vigorously. We agree with this assessment. Therefore, other than to correct a clerical error in the abstract of judgment, we affirm the judgment.

FACTS

The Trial

On the afternoon of January 19, 2005, the police found 69-year-old Arthur Hayes in his home in Costa Mesa. He was lying dead on the floor of his study, with gunshot wounds to his head and chest. At trial, Thomas admitted he was the killer and spoke at length regarding his relationship with Hayes and the circumstances surrounding the shooting.

Thomas testified Hayes married his mother Edith when he was young, and during his childhood, Hayes sexually molested him and his two sisters. When Thomas was 12 years old, he confronted Hayes about the molestation, and Hayes stopped abusing him. However, Hayes continued to molest his sisters until they got married. Hayes also masturbated openly around the house, took sexual advantage of the employees of a restaurant he owned, and sought out children in Central America for sex. According to Thomas, Hayes also had a violent temper and was extremely domineering and difficult to get along with.¹

¹ The prosecution did not dispute this characterization of the victim. In fact, in his opening statement, the prosecutor alluded to Hayes as a "monster."

Given Hayes' behavior and personality, Thomas loathed him immensely. Over the years, he was even heard to say from time to time that he wanted to kill Hayes. However, he was never able to make a clean break from him, even as an adult, primarily because of Hayes' financial influence within the family and Thomas' affection for his mother Edith. These factors figured prominently in the final months of Hayes' life.

In 2004, Hayes and Edith decided to move to Hawaii. They had purchased a condominium there and anticipated moving to the island in early 2005. Knowing this, Thomas and his wife Colinda concluded they also wanted to move their family to Hawaii. In anticipation of relocating, they temporarily moved into Hayes' Costa Mesa home, along with their teenage daughters Tiffany and Michelle. This was in the summer of 2004, about half a year before the shooting.

Thomas described this move as a cost-cutting measure. He said Edith and Hayes were not around the house much during this time, so he did not have any problems with Hayes and things were fine. However, Edith's health eventually began to decline, and on January 14, 2005, five days before the shooting, she was admitted to the hospital due to congestive heart failure. This was right around the time that everybody had planned to move to Hawaii. So while Thomas and Hayes made time to visit Edith in the hospital, they were also busy packing the house and making other arrangements for the move.

On January 19, Colinda went to work and Thomas dropped off Tiffany and Michelle at school around 8:30 a.m. He then returned home, went into the garage and began "getting stuff ready" for the move. After awhile, he went into the house and heard the shower running upstairs. As he was going about his business, he suddenly noticed Hayes masturbating naked near the top of the stairs. Thomas laughed sarcastically, thinking Hayes was just being his usual perverted self. He then went back out into the garage and continued packing.

A bit later, Hayes joined Thomas in the garage and expressed displeasure at the pace of the move. He had ordered a storage pod to be dropped off at the house that day, but since many items were not packed yet, he had to scrap the order and pay a cancellation fee. This made him very upset, and he blamed Edith for the situation. Although she was in the hospital at the time, Hayes felt she hadn't done enough in terms of preparing for the move.

Thomas didn't like the fact Hayes was blaming Edith for his problems. He knew Edith was scheduled to be released from the hospital that day, and he was worried Hayes was going to overwork her when she came home. When Thomas expressed this concern to Hayes, he replied, "She's my wife, I'll do what I want." Hayes said he was anxious for Edith to come home and start helping with the move, but Thomas did not think she was physically ready to leave the hospital.

As the morning wore on, Thomas continued packing in the garage, and Hayes was going in and out of the house, making phone calls and trying to get things in order. When Thomas remarked that he was paying too much attention to the move and not enough attention to Edith, Hayes told him he didn't know "what the fuck" he was talking about. Hayes became increasingly frustrated and angry about the situation, and then, for reasons unexplained by Thomas, he suddenly started talking about his sexual ambitions.

He told Thomas that once they moved to Hawaii, he was going to put Edith up in their condominium, so he could drive around in his motor home (which he referred to as his "sex wagon"), picking up young men and women. He pined for the "good old days," when he molested Thomas' siblings and stated he would like to "do" his grandchildren Marshauna and Jessica. He also said Jessica's younger sister was starting to look pretty good to him.

Thomas found these remarks very disturbing. He knew that, years earlier, Hayes had once made an inappropriate sexual comment to Marshauna, and

that on another occasion, he had pulled on his daughter Tiffany's bra strap. In the wake of these events, the family had insisted Hayes seek therapy and not be alone with the grandchildren. However, given everything he knew about Hayes, and in light of what Hayes was telling him at the moment, Thomas suspected he was still a dangerous sexual predator. This suspicion grew even stronger in Thomas' mind when Hayes told him he was thinking of taking Tiffany and Michelle for rides in his motor home. After making this comment to Thomas, Hayes walked into his house and made his way to the study.

Thomas was enraged. As he stood alone in the garage, his thoughts turned to a gun that was lying on a nearby card table.² He picked up the gun, walked into Hayes' study and confronted him with the weapon. "You're never going to stop, are you?" he asked of Hayes. When Hayes asked him what he meant, Thomas said, "You're never going to stop raping and fucking people's lives up, are you?" Hayes replied, "No, that's what I do." He then asked Thomas what he was planning on doing with the gun. Thomas answered with his actions, firing off three rounds. Two of the shots struck Hayes in the head, and the other penetrated his heart.

At trial, Thomas described the shooting as a hazy blur. However, he could recall Hayes saying "you shot me," after the first bullet struck him. Thomas also admitted that, after the third shot, he could still hear Hayes breathing. Despite this, he did not think to call an ambulance.

Following the shooting, he walked back into the garage, put away the gun and had a smoke. He then called various family members, including Edith, on Hayes' cell phone and told them there had been an accident. After that, he drove to

² Thomas testified he and Colinda had acquired the gun, a .357 revolver, about a month earlier so that Colinda could take up target shooting. They usually kept the gun locked up in the garage, but on the night before the shooting, Thomas took it out for cleaning, loaded it and then left it on the card table.

the barbershop where he worked and made arrangements to turn himself in to the authorities.

As for his intentions in confronting Hayes, Thomas testified he merely wanted to threaten, not shoot or kill him. He said he was upset over the prospect of Hayes harming his family and considered him to be a grave threat to his mother and daughters. He thought Hayes was going to work Edith to death after she was released from the hospital and that he would subject Tiffany and Michelle to repeated acts of sexual abuse, including rape. Regarding his perception of the risk to his daughters, he testified, “I knew [Hayes] was going to try to molest them. I knew it was not going to be long.” However, Thomas was aware of the fact his daughters were far away at school at the time of the shooting. Because of this, he knew that if Hayes was going to try to molest them, he could only do so at some time “in the future” and not right away. He also acknowledged there may have been ways for him to protect his family without shooting Hayes.

At the close of evidence, the trial court instructed the jury on manslaughter as a lesser-included offense of murder, under the theories of heat of passion and imperfect defense of others. It also instructed on the perfect defense of others, which is a complete defense to murder.

In closing argument, the prosecutor admitted Hayes had done some horrible things in his life. However, he maintained that was no reason for Thomas to kill him. He also argued there was insufficient evidence to support Thomas’ defense of others theory. While conceding Hayes may have presented a *future* danger to Thomas’ mother and daughters, the prosecutor submitted Hayes was not an *imminent* threat to them at the time of the shooting, and therefore the theory was inapt.

The prosecutor also observed that defense counsel appeared to change strategies in the middle of the trial. During the prosecution’s case, defense counsel cross-examined various witnesses in a manner to suggest Thomas may not have been

the person who killed Hayes.³ However, Thomas ended up taking the stand, admitting he was the killer and claiming his actions were justified. Speaking to this strategic shift, the prosecutor said, “This is sort of the smorgasbord defense. This is let’s choose a defense and run with it. If it doesn’t work, we will choose another defense.”

In response, defense counsel told the jury he had the right to challenge the prosecution’s evidence without putting Thomas on the stand. However, as it turned out, Thomas had a burning desire as an innocent person to tell his side of the story, so after the prosecution rested, he decided to testify and tell the jury what really happened. Defense counsel said Thomas testified “because in his mind at the time of the act he absolutely believed that what he was doing was protecting his mother and his daughters from absolute atrocious crimes.” Defense counsel posited that Thomas’ belief in this regard was objectively reasonable, and therefore he was legally justified in killing Hayes. Alternatively, counsel argued that even if Thomas’ actions were not reasonable from an objective standpoint, he was only guilty of manslaughter because he actually believed in the need to protect his family. In so arguing, defense counsel compared Thomas’ actions to that of a battered woman who suddenly “snaps” and shoots her abuser.

On rebuttal, the prosecutor belittled this analogy as yet another new and desperate theory of defense. He also pointed out that, during the trial, there was no expert testimony on the issue of Battered Women’s Syndrome.⁴ The prosecutor urged the jury to find Thomas guilty of murder in the first degree, based on the evidence of

³ Besides Thomas, several other people, including Colinda and Hayes’ son Arthur, Jr., were known to have a deep dislike of Hayes.

⁴ Battered Women’s Syndrome is a label used to describe the characteristics battered women tend to exhibit as a consequence of being abused by a dominant figure in their lives. (*People v. Jasparr* (2002) 98 Cal.App.4th 99, 107.) However, the syndrome is not limited to women and can apply in the context of male victimization, as well. Therefore, for purposes of this opinion, we will refer to the syndrome as Battered Person’s Syndrome, or BPS. (Accord, *People v. Romero* (2007) 149 Cal.App.4th 29.)

premeditation, and in the end, that is what the jury did. It also found Thomas personally discharged a firearm during the offense. Based on these findings, the trial court sentenced Thomas to an aggregate term of 50 years to life in prison.

New Trial Motion

Following the verdict, Thomas moved for a new trial on the basis he was denied his right to effective assistance of counsel. He claimed his attorney was ineffective for presenting inconsistent defenses, i.e., identification and justification, and failing to consult a mental health professional to determine whether he was suffering from BPS at the time of the shooting. Thomas also faulted his attorney for failing to present additional evidence regarding Hayes' predilection for sexual deviancy. Thomas posited that if his attorney had focused exclusively on the defense of others, played up his mental vulnerability, and made a greater attempt to vilify Hayes, he would likely have obtained a more favorable verdict.

In a hearing that spanned several weeks, the trial court heard extensive testimony on these issues. Defense counsel Mitchell Haddad testified that identification and justification were the two primary defenses he had in mind when the trial started. And although the prosecution presented a strong circumstantial case on the issue of identity, he still planned on challenging the sufficiency of the evidence on that issue. However, Thomas had other ideas. Up until that time, it was understood Thomas would not be testifying. But after the prosecution finished its case-in-chief, Thomas decided, against Haddad's strong advice, he wanted to take the stand. And of course after he did, identification was no longer an issue, and Haddad was limited to the defense of justification.

Haddad suspected the perfect defense of others was going to be a hard sell because, at the time of the shooting, Edith was in the hospital and Thomas' daughters were at school. However, Haddad thought that if he could show Thomas actually believed his family was in imminent danger from Hayes when the shooting

took place, the jury would opt for manslaughter rather than murder, under the theory of imperfect defense of others.

Although this issue turned on Thomas' state of mind, Haddad did not think it was a good idea to have Thomas examined by a mental health professional. Haddad figured that because Thomas hadn't been molested in years and was not under the stress of abuse at the time of the shooting, he was not a good candidate for invoking a full-fledged BPS defense. Haddad's fear was that if an expert on BPS was unable to give an airtight opinion in Thomas' favor, he would be subject to effective cross-examination by the prosecutor. However, Haddad felt the issue of BPS is sufficiently well known to the public that the jury would be able to understand its potential application to the case without the help of an expert, so he brought the issue up in closing argument.

Haddad also believed the jury might be inclined to invoke its power of nullification and acquit Thomas on the basis Hayes was such a terrible person that Thomas did not deserve to be punished for killing him. Since there was plenty of evidence of Hayes' sexual misdeeds, and the prosecution did not dispute he was a sexual predator, Haddad did not think it was necessary to present additional evidence on this issue. He was satisfied the jury had a good sense of the family dynamic and the core facts of the case would win sympathy for Thomas.

Criminal defense attorney John Barnett took issue with nearly every aspect of Haddad's handling of the case. Testifying as an expert witness on Thomas' behalf, he said Haddad was remiss for simultaneously pursuing the issues of identification and the defense of others, which he characterized as "mutually exclusive defenses." Barnett also said that, given Thomas' history of sexual abuse, the defense should have had him psychologically evaluated, in order to determine whether he suffered from BPS, Post Traumatic Stress Disorder or some other condition that may have affected his perception of Hayes. In addition, Barnett said

Haddad should have presented additional evidence, including expert testimony, on the issue of Hayes' propensity for child molestation.

Barnett testified that if Haddad had done these things, the jury would have had a better understanding as to why Thomas shot Hayes. However, Barnett refused to speculate as to whether the outcome of the case would actually have been any different. And as to the issue of the defense of others, Barnett admitted this was not a particularly strong theory for the defense. Barnett cited both the factual circumstances surrounding the shooting, as well as Thomas' own testimony, as to why that was the case.

In addition to Barnett, Thomas also presented testimony from two psychologists, Dr. Linda Hopkins and Dr. Michael Perrotti. Dr. Hopkins opined Thomas was mentally impaired at the time of the shooting in that he was unable to control his impulses and act in a rational fashion. However, her testimony was riddled with so many inconsistencies the trial court disregarded it altogether. As for Dr. Perrotti, he believed that, given Hayes' sexual abuse of Thomas as a boy, Thomas may have been suffering from BPS or some such disorder at the time of the shooting. But Perrotti admitted his opinion in this regard was merely "preliminary," and he could not render a more definitive opinion without talking to Thomas. Neither he nor Hopkins conducted a complete psychological evaluation of Thomas at any point in the proceedings.

In ruling on the motion, the trial court stated Haddad probably should have had Thomas psychologically evaluated to determine whether, in light of his history with Hayes, he was particularly sensitive to any danger Hayes may have posed to others at the time of the shooting. However, the court determined this failing was not prejudicial in light of Thomas' own testimony. Because Thomas admitted he did not consider Hayes to be an *imminent* threat to his daughters or his mother when he shot him, the court found he could not have prevailed on his defense of others claim,

regardless of how Haddad handled the case. In other words, the court was convinced Thomas was convicted “because of what he said when he took the stand,” not “because he didn’t have a good lawyer.” Therefore, it denied his motion for a new trial.

DISCUSSION

Thomas contends the court’s ruling was erroneous, and despite all the shortcomings in his testimony, he still could have prevailed on his defense of others claim if his attorney had pursued the defense more vigorously. Again, his main complaints against Haddad are that he should have focused exclusively on the defense of others, had a psychological expert involved in the case, and made a greater effort to paint Hayes as a sexual deviant. However, we agree with the trial court that none of these things would have made a difference in light of Thomas’ testimony which, as he concedes on appeal, failed to establish the requirement of imminency. Therefore, we must affirm his conviction.

A defendant alleging ineffective assistance of counsel “““must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.”” [Citation.] Prejudice occurs only if the record demonstrates ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” (*People v. Lucero* (2000) 23 Cal.4th 692, 728.) “If defendant fails to show that he was prejudiced by counsel’s performance, we may reject his ineffective assistance claim without determining whether counsel’s performance was inadequate. [Citation.]” (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41.) Here, Thomas’ ineffective assistance of counsel claim fails for lack of prejudice.

For a killing to be in “perfect self-defense,” the defendant “must actually and reasonably believe in the need to defend. [Citation.] If the belief subjectively exists but is objectively unreasonable, there is ‘imperfect self-defense,’

i.e., ‘the defendant is deemed to have acted without malice and cannot be convicted of murder,’ but can be convicted of manslaughter. [Citation.]” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082, fn. omitted (*Humphrey*).)

The same principles apply to the defense of others. Whereas perfect defense of others is a complete defense to murder, “one who kills in imperfect defense of others — in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury — is guilty . . . of manslaughter.” (*People v. Randle* (2005) 35 Cal.4th 987, 997.)

Imminency is an essential component of both self-defense and the defense of others. (Pen. Code, § 197; *Humphrey, supra*, 13 Cal.4th at p. 1094 (Brown, J., concurring).) As far back as 1869, our Supreme Court explained that a threat posed by an aggressor will not suffice to justify a deadly response unless the circumstances accompanying the threat “would induce a well founded belief in the mind of a reasonable person that his adversary was on the eve of executing the threat, and that his only means of escape from death or great bodily injury was immediately to defend himself against the impending danger” (*People v. Scoggins* (1869) 37 Cal. 676, 684.)

Given these requirements, the doctrine of imperfect self-defense is necessarily a “narrow” one. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) It “requires without exception that the defendant must have had an *actual* belief in the need for self-defense. . . . Fear of future harm — no matter how great the fear and no matter how great the likelihood of the harm — will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury. “[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*” . . . [¶] This definition of imminence reflects the great value our society places on human

life.’ [Citation.] Put simply, the trier of fact must find an *actual* fear of an *imminent* harm. Without this finding, imperfect self-defense is no defense.’” (*Ibid.*)

As we have stated, the same rules apply to the imperfect defense of others. (*People v. Randle, supra*, 35 Cal.4th at p. 997.) That means Thomas could only prevail on his defense of others claim if, at the time of the shooting, he actually perceived Hayes to be an imminent threat to his mother or his daughters. But when the shooting occurred, his mother and daughters were not even in the house; they were miles away in the safe care of others. As Thomas conceded in his testimony, this made Hayes, at most, a “future” threat to his family. Moreover, Thomas admitted in his testimony there may have been other ways of protecting his family from Hayes, besides shooting him. Irrespective of any favorable evidence the defense may have been able to gather on the issue of BPS, these admissions made it virtually impossible for Thomas to prevail on his defense of others claim.

It is no doubt true that expert testimony on BPS can be highly relevant in cases where the defendant has been sexually or physically abused by the victim in the past. But only if the defendant actually believed the victim posed an imminent threat to himself or others at the time of the killing. In that circumstance, an expert on BPS can help the jury understand *why* the defendant believed it was necessary to kill the victim, which goes to the subjective component of self-defense. (*Humphrey, supra*, 13 Cal.4th at pp. 1084-1086.) BPS evidence may also be relevant in terms of bolstering the defendant’s credibility regarding his belief in this regard. And, it can be used to shed light on the issue of objective reasonableness, by explaining how the situation appeared from the defendant’s perspective. (*Id.* at pp. 1086-1089.) However, as the *Humphrey* case illustrates, there must be evidence the defendant *actually* believed his actions were necessary to thwart an *imminent* danger posed by the victim.

In *Humphrey*, the evidence not only showed a long history of abuse between the defendant and the victim, it revealed the victim had actually threatened to kill the defendant and shot at her the day before the killing occurred. (*Humphrey*, *supra*, 13 Cal.4th at pp. 1078-1080.) There was also evidence that the victim had threatened to kill the defendant and reached for a gun just moments before the killing took place. (*Ibid.*) Thus, from an objective standpoint, there was substantial evidence of imminent peril to the defendant. In addition, the defendant testified to her belief that if she didn't grab the gun and shoot the victim, the victim was going to shoot her first. (*Id.* at p. 1080.) Under these circumstances, the failure to allow expert testimony on BPS was deemed prejudicial because it could have established the reasonableness of the defendant's beliefs, as articulated in her testimony and corroborated by the other evidence in the case. (*Id.* at pp. 1089-1090.)

Here, in contrast, the underlying circumstances surrounding the shooting did not suggest Hayes posed an imminent threat to anyone. And more importantly, there is no evidence Thomas actually believed that he did. These circumstances distinguish this case from *Humphrey*, as well as the principal opinion Thomas relies on, *In re Walker* (2007) 147 Cal.App.4th 533 (*Walker*).

In *Walker*, the court held defense counsel was ineffective for failing to present evidence on BPS because, although Walker testified she shot her abusive husband by accident, there was also substantial evidence she acted in imperfect self-defense. In fact, on the day of the shooting, the victim pointed a shotgun at Walker and threatened to kill her. This prompted her to flee the house and call the police. When she returned home later that day to collect her belongings, the victim confronted her a second time. Again, she called the police, telling them, "I know he is going to kill me and I can't get away.'" (*Walker*, *supra*, 147 Cal.App.4th at p. 539.) Moments later, the victim produced a gun, and Walker grabbed it to prevent him from using it. In the process, the gun discharged, killing the victim.

Walker maintained that even though she feared the victim was going to kill her, she did not intend to kill him; rather, the victim's death was only an accident. Based on this testimony, defense counsel did not pursue the theory of imperfect self-defense, for fear it would appear inconsistent with Walker's claim of accident. However, this tactic didn't work, and Walker was ultimately convicted of murder in the second degree. (*Walker, supra*, 147 Cal.App.4th at p. 540-541.)

Relying on the fact there was substantial evidence Walker killed in imperfect self-defense, the *Walker* court reversed. The court first pointed out that, under *People v. Barton* (1995) 12 Cal.4th 186, "so long as there is substantial evidence from which a jury can find imperfect self-defense and thereby reduce a murder to voluntary manslaughter, the jury must be given that opportunity, even if imperfect self-defense is inconsistent with a defendant's theory of the case and directly at odds with the defendant's testimony describing how the crime occurred. [Citations.]" (*Walker, supra*, 147 Cal.App.4th at p. 552.)

The court then determined the circumstances of Walker's case were such that her attorney's failure to present evidence on BPS was prejudicial in the extreme. This determination rested primarily on the strength of the evidence of imperfect self-defense, particularly Walker's own statements that she was in imminent fear of the victim at the time of the shooting. The court stated, "Under *Humphrey* expert testimony [on BPS] would have assisted the jury in assessing the nature and extent of that fear and permitted it to properly apply the trial court's instructions on murder and voluntary manslaughter, including its instructions on imperfect self-defense, to the testimony not only of Walker herself but also of [the police officer she was speaking to] when the shooting occurred." (*Walker, supra*, 147 Cal.App.4th at pp. 552-553.)

Here, however, Thomas never said that he believed Hayes was an imminent threat to his mother or daughters at the time of the shooting. Therefore,

evidence on BPS would not have aided the jury in a similar fashion. To the contrary, it may have left the jury wondering why such evidence was presented in the first place. “Obviously,” if there isn’t evidence that the defendant actually believed in the imminent need to defend, then “then the experts [on BPS] have nothing to corroborate[.]” (*Menendez v. Terhune* (9th Cir. 2005) 422 F.3d 1012, 1031.)

An additional consideration in *Walker* was that, in finding Walker guilty of second degree murder, the jury rejected the prosecution’s theory that she killed the victim in a premeditated fashion. (*Walker, supra*, 147 Cal.App.4th at p. 553.) But here, there was considerable evidence of premeditation (e.g., Thomas had previously threatened to kill Hayes and he loaded the gun the night before the shooting), and the jury convicted Thomas of first degree murder on that basis. Even if the defense had presented expert testimony on BPS, Thomas would have had an exceedingly hard time achieving a more favorable result, given the basic facts surrounding the shooting and the strong evidence of motive and intent. In this regard, it is important to keep in mind that a defendant claiming the defense of others must show he “really acted under the influence of [his] fears, and not in a spirit of revenge.” (*People v. Randle, supra*, 35 Cal.4th at p. 999.)

As far as the *Walker* case is concerned, it is also worth noting that the evidence presented in support of a new trial there included testimony from a psychologist who had evaluated Walker and was fully prepared to render an opinion that she suffered from BPS. Compare that to the psychological evidence tendered in this case — where one doctor was so discredited during cross-examination that the court disregarded her testimony altogether, and the other doctor never even saw Thomas — and it’s easy to see why the court was not swept away by Thomas’ BPS theory. The truth is, he hadn’t been abused by the victim in decades, and his proffered evidence on the issue was simply not very persuasive.

Again, though, the chief flaw in Thomas' case was the absence of an evidentiary foundation for the admission of expert testimony on BPS. Expert testimony on that subject cannot substitute for the lack of proof the defendant actually believed the victim posed an imminent threat to others. Such proof can come from various sources, including the defendant's statements at or before trial, but it cannot consist solely of opinion testimony from an expert. In fact, the law precludes an expert on BPS from testifying as to whether the defendant actually believed he was in imminent danger at the time of the charged offense. (Pen. Code, § 29; *People v. Erickson* (1997) 57 Cal.App.4th 1391.)

Given Thomas' failure to establish the imminency requirement, it doesn't matter that defense counsel failed to have him psychologically evaluated with a view toward presenting expert testimony on BPS. Nor does it make any difference that defense counsel failed to focus exclusively on the defense of others or failed to produce additional evidence on Hayes' predilection for sexual deviancy. To prevail on his defense of others claim, Thomas was required to "make some showing that he *actually believed* the peril [Hayes presented was] imminent." (*Menendez v. Terhune, supra*, 422 F.3d at p. 1028, italics added.) While the evidence established Hayes' capacity to harm Thomas' mother and daughters at some point in the future, it failed to show "that, at the moment [Thomas shot Hayes] to death, he feared [his mother or daughters were] in imminent peril." (*Id.* at p. 1030.)

In light of this deficiency, defense counsel cannot be faulted for the outcome that occurred. Like the trial court, we are convinced Thomas was convicted based on what he said on the witness stand, as opposed to any failing of his attorney. Therefore, we have no occasion to disturb his conviction.

There is one minor error in the record, however, and that pertains to a clerical error in the abstract of judgment. As the Attorney General notes, the abstract states that Thomas' sentence on the firearm enhancement is 25 years in prison. But

the punishment for that particular enhancement is actually 25 years *to life* in prison (Pen. Code, § 12022.53, subd. (d)), which is what the trial court imposed. Therefore, we will modify the judgment to correct this error. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may correct clerical errors that appear in the abstract of judgment].)

DISPOSITION

The abstract of judgment is modified to reflect that Thomas' sentence on the firearm enhancement under Penal Code section 12022.53, subdivision (d) is 25 years to life in prison. The clerk of the trial court shall prepare an amended abstract of judgment reflecting this modification and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.